BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995) (FCC Triennial Review Nine-Month Phase)

ASSIGNED COMMISSIONER'S RULING AUTHORIZING CONTINUATION OF BATCH CUT PROCEEDINGS

Introduction

This ruling supplements the "Assigned Commissioner's Ruling" dated June 18, 2004, suspending proceedings on the Federal Communications Commission (FCC) Triennial Review Order (TRO). The suspension was ordered pursuant to the March 2, 2004, decision of the D. C. Circuit in *United States Telecom Assoc.* v. *FCC*, 359 F. 3d 554 (D. C. Cir. 2004) ("*USTA II*"). In *USTA II,* the D. C. Circuit affirmed in part and vacated in part the FCC's TRO rules. On June 16, 2004, the District Court's *vacatur* order became effective.

This ruling serves notice that the portion of the proceeding relating to batch hot cut processes and pricing is not suspended, but shall continue to move forward. The *vacatur* ordered by *USTA II* does not vacate the need to establish appropriate hot cut processes capable of handling customer migrations among

carriers if, or to the extent that, competitive local exchange carriers (CLECs) lose access to unbundled network element (UNE) switching.

Discussion

On March 16, 2004, Administrative Law Judge (ALJ) Pulsifer issued a "Ruling Denying Motion of Verizon to Stay Proceeding." In that ruling, the ALJ stated that the batch hot portion of the proceeding should move forward notwithstanding whether the remainder of the proceeding was suspended.

On March 30, 2004, SBC filed an objection to the ALJ's ruling, challenging the conclusion that the batch hot cut portion of the proceeding could continue even if the remaining TRO issues were suspended. SBC argued that, in vacating the FCC's subdelegation scheme for mass market switching (47 C.F.R. § 51.319(d)(2)), the Court necessarily vacated the hot cut impairment determinations as well (§ 51.319(d)(2)(ii)), claiming they are embedded within the FCC's mass market switching determinations. In view of the *USTA II* mandate, SBC thus argues, there is no TRO ". . . requirement to approve a hot cut process . . . ."[1]

SBC notes that the Court found (1) the FCC failed to take into account the necessary "nuanced" geographic distinctions required under *USTA I*, (2) the FCC in effect ignored its findings in previous 271 decisions that incumbent local exchange carriers' (ILECs) hot cut processes provided nondiscriminatory access and are sufficiently scaleable to meet CLECs' future demands, and (3) the FCC

[1] *See, March 16, 2004 Ruling* at 9.

"implicitly conceded that hot cut difficulties could not support an undifferentiated nationwide impairment finding."[2]

We find nothing in *USTA II*, however, that precludes this Commission from moving forward to issue a decision concerning the evidence that has been presented concerning a batch cut process. *USTA II* did not hold that the lack of a low-cost, efficient batch hot cut process could not be the source of impairment. It merely held that the FCC could not base a national finding of impairment on the lack of efficient batch cut processes because the FCC lacked sufficiently granular evidence as to hot cut processes in different markets. (*USTA II,* 359 F.3d at 569-570.) While the Court explicitly vacated the national impairment finding, it was conspicuously silent as to the FCC's order to states to develop a batch cut process. In any event, implementation of a low-cost, efficient batch hot cut process will be a critical part of any post UNE-P world.

SBC also argues that even if the batch cut provisions were separate and apart from the mass market determinations, the batch cut provisions could not be implemented on a "standalone basis" because the framework for approving and implementing a batch cut process necessarily involves findings and determinations prescribed in the mass market switching analysis vacated by *USTA II*. More precisely, SBC argues that the TRO required state commissions to establish a batch cut process on a *market-by-market basis* or explain why such a batch cut process is unnecessary in any particular geographic market.[3]

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[2] *USTA II* at 18-22.

[3] *See, e.g., TRO*, ¶¶ 487-490; 47 C.F.R. § 51.319(d)(2)(ii).

We disagree with SBC's argument that batch hot cut processes cannot be addressed in a Commission decision on a "standalone basis" before issuing findings on market definition. First, ILECs proposed use of the same batch cut processes throughout their service territories, irrespective of how individual markets are defined. Thus, these generic processes for completing batch cuts can therefore be considered on their own merits to the extent they would be the same across different markets. Accordingly, it is not necessary for the Commission first to define the size of the mass market in order to review the merits of currently proposed batch cut processes.

Moreover, while both ILECs presented batch cut proposals, neither presented evidence that a batch cut process is unnecessary in any particular geographic market where UNE-P would be eliminated. Therefore, there is no reason why the Commission cannot proceed with determinations as to batch cut processes on a "standalone basis" without concurrent findings on other portions of the TRO that have been vacated.

Of course, a "standalone" Commission decision on batch cut processes will not contain findings as to markets, if any, where there is no impairment. Thus, no immediate timetable for the elimination of UNE-P and concurrent implementation of a batch cut process will be set in motion as a result of a Commission "standalone" batch cut decision. Yet, there will still be value in making findings concerning the necessary batch cut processes. If, or to the extent that, UNE-P is subsequently eliminated, such appropriate batch cut processes will be needed. Timely resolution of this issue by the Commission now will avoid unnecessary delays in implementation later.

Moreover, *USTA II* was silent concerning the TRO requirement that batch hot cut pricing be set at Total Element Long Run Incremental Cost (TELRIC). In

order for a batch cut process to be economical for use by a competitor, appropriate prices for use of such processes must be determined and implemented. The record in this proceeding on batch cut processes includes the issue of TELRIC pricing applicable to batch cut processes that are to be implemented. Accordingly, there is no reason why the Commission should not proceed to consider and approve appropriate cost-based prices for the batch cut processes that are to be implemented.

IT IS RULED that**:**

1. Notice is hereby given that the portion of the Triennial Review Order (TRO) proceeding relating to approval of a batch hot cut process and related pricing is not suspended and will continue in progress.

2. The assigned Administrative Law Judge (ALJ) is hereby authorized to proceed with preparation of the ALJ's Proposed Decision addressing the submitted record on batch hot cut issues, including related pricing issues.

3. The remaining portions of the TRO proceeding, other than those relating to hot cut issues, remain suspended pursuant to the previously issued Assigned Commissioner's Ruling, dated June 18, 2004.

Dated July 2, 2004, at San Francisco, California.

/s/ SUSAN P. KENNEDY
Susan P. Kennedy
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's Ruling Authorizing Continuation of Batch Cut Proceedings on all parties of record in this proceeding or their attorneys of record.

Dated July 2, 2004, at San Francisco, California.

/s/ KE HUANG
Ke Huang

N O T I C E

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